UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 90-73-P-C***
	)	***(Civil No. 97-50-P-C)***
RICHARD HARMON BELL,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Richard Harmon Bell moves the court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Bell was convicted of possessing a firearm in violation of 18 U.S.C. § 922(g)(1), the "felon-in-possession" law. The court determined that he was subject to sentence enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), which applies when a person who violates section 922(g)(1) has at least three previous convictions for a violent felony and/or serious drug offense. Bell now seeks to challenge his sentence in light of the First Circuit's subsequent decision in *United States v. Caron*, 77 F.3d 1 (1st Cir.) (en banc), *cert. denied*, 116 S.Ct. 2569 (1996).

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief." *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). I recommend dismissal of the motion on that basis.

The legality of the defendant's sentence has twice been the subject of the First Circuit's scrutiny on direct appeal. In *United States v. Bell*, 966 F.2d 703 (1st Cir. 1992), the First Circuit ruled that he had been improperly sentenced because violating the felon-in-possession law is not a "crime of violence" sufficient to trigger the career-offender provisions set forth in section 4B1.1 of

the United States Sentencing Guidelines. *Id*. at 707. The court therefore vacated his original sentence of 365 months' incarceration. *Id*.; Judgment (Docket No. 5) at 2. In *United States v. Bell*, 988 F.2d 247 (1st Cir. 1993), the First Circuit rejected the defendant's challenge to his recalculated prison sentence of 180 months, which is the mandatory minimum under the ACCA. *Id*. at 249; Amended Judgment (Docket No. 15) at 2. Noting that Bell had explicitly agreed to the trial court's finding at the original sentencing proceeding that he had been previously convicted of six violent felonies, and thus duly sentenced under the ACCA, the First Circuit held that he could not interpose such an objection on remand. *Id*. at 249, 252.

Two years later, the *en banc* panel of the First Circuit made a significant change in the circuit law governing the range of prior convictions that may be used as predicate offenses under the ACCA. *Caron*, 77 F.3d at 5 (overruling *United States v. Ramos*, 961 F.2d 1003 (1st Cir. 1992)). By statute, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" may not serve as a predicate conviction for purposes of the ACCA "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20). In this context, civil rights "generally encompass the right to vote, the right to seek and hold public office, and the right to serve on a jury." *United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir. 1996) (citations and internal quotation marks omitted), *cert. denied*, 117 S.Ct. 1344 (1997). What *Caron* established is that "individualized action" is not required to restore a defendant's civil rights within the meaning of section 921(a)(2); rather, a conviction under a Massachusetts law, for which the right to vote had never been deprived and for which the two other civil rights had been restored by virtue of a statute of general application, came within section 921(a)(20) and was therefore not a predicate

offense. *Caron*, 77 F.3d at 5-6. Bell contends he is entitled to resentencing because four prior Massachusetts state-law convictions were improperly counted as predicate offenses in light of the rule announced in *Caron*. I disagree.

Subsequent to *Caron*, the First Circuit has had occasion to consider the other element of section 920(a)(20), which explicitly permits a prior conviction to be deemed a predicate offense for ACCA purposes, even when civil rights are restored, if the defendant remains prohibited from shipping, transporting, possessing or receiving firearms. In light of this provision, the court held that felony convictions under Massachusetts law are properly considered predicate offenses given that state's statutory ban on handgun possession by ex-felons outside the home or business. *United States v. Estrella*, 104 F.3d 3, 8 (1st Cir. 1997); *see also United States v. Alston*, 1997 WL 214693 at *7 (1st Cir. May 5, 1997) (same). Bell advances no credible argument for why *Estrella* should not be controlling here, and I conclude that it is.

In his reply memorandum, Bell seeks to raise a new ground for relief, i.e., that the court was without subject matter jurisdiction to entertain the charges against him. This argument is entirely without merit. The court obviously has jurisdiction to adjudicate criminal cases arising under the federal felon-in-possession law. On examination, Bell's jurisdictional argument is really a contention that he should not have been convicted of violating section 922(g)(1) in light of non-retroactivity language elsewhere in section 922 concerning the unlawful transportation of firearms. A section 2255 motion is not an appropriate vehicle for resolving issues that could have been raised on direct appeal absent circumstances not alleged here. *United States v. Smullen*, 94 F.3d 20, 23 (1st Cir. 1996). Moreover, the underlying argument — that the government should have been required to prove that the firearm unlawfully possessed by Bell was not in Maine prior to the effective date

of the statute — is facially meritless.

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 15th day of May, 1997.

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David M. Cohen
United States Magistrate Judge